

FILED

UNITED STATES COURT OF APPEALS

JAN 13 2010

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

In re: WILLIAM BERGERON.

No. 09-74059

WILLIAM BERGERON,

D.C. No. 3:05-cv-03110-MHP
Northern District of California,
San Francisco

Petitioner,

ORDER

v.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA (SAN FRANCISCO),

Respondent,

YANCIE YOUNG,

Real Party in Interest.

Before: SILVERMAN, PAEZ and BEA, Circuit Judges.

Petitioner has not demonstrated that this case warrants the intervention of this court by means of the extraordinary remedy of mandamus. *See Bauman v. United States Dist. Court*, 557 F.2d 650 (9th Cir. 1977). The posture of the case did not require the district judge to rule on qualified immunity. The district court

had before it only the real party in interest's motion; there was no cross-motion by petitioner. Accordingly, the petition is denied.

In denying the petition for writ of mandamus, we in no way preclude the petitioner from seeking a ruling by the district court on his affirmative defense of qualified immunity either by a properly filed motion for summary judgment or at trial.

Petitioner's alternative request to construe this petition as a notice of appeal of the district court's December 14, 2009 order, entered December 15, 2009, and a motion for stay of district court proceedings is denied.

BEA, Circuit Judge:

I dissent. The district court erred in entering partial summary judgment in favor of real party in interest Young with respect to his 42 U.S.C. § 1983 claim of an unconstitutional search without having determined the issue of qualified immunity, *vel non*. See *Pearson v. Callahan*, 129 S. Ct. 808 (2009); *Saucier v. Katz*, 121 S. Ct. 2151 (2001).